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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

C. D. VERNON, in his official capacity as Sheriff of Rockingham County, North Carolina,

Petitioner,

vs.

WAYNE HARTER and ROBERT PAYNE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

I. THE PANEL OPINION IS IN CONFLICT WITH THE SUPREME COURT'S VERY RECENT DECISION OF *McMILLIAN v. MONROE COUNTY, ALABAMA.*

On June 2, 1997, this Court issued its decision in *McMillan v. Monroe County, Alabama*, No. 96-542, 1997 WL 284827 (U.S. June 2, 1997). The *McMillan* case does not specifically deal with the Eleventh Amendment inquiry at issue in this case; however, *McMillan* deals with the closely related issue of whether, in a suit under 42 U.S.C. § 1983, a local county sheriff in Alabama is a "policymaker" for the County or a policymaker for the State of Alabama. *Id.* at *2-3. In *McMillan*, this Court made it crystal clear that the question of whether the local Alabama sheriff represented the State or the County was "dependent on an analysis of state law." *Id.* at *4. In so holding, this Court cited *Regents of University of California v. Doe*, __ U.S. __, 117 S. Ct. 900, 904 n. 5, 137 L. Ed. 2d 55 (1997), a case in which this Court stated that the question of whether a particular entity is an arm of the State "can be answered only after considering the provisions of state law that define the agency's character." *Id.* Significantly, this Court, in *McMillan*, while holding that the local county sheriff represented the State of Alabama when executing law enforcement duties, did not discuss concerns regarding the State treasury. Indeed, this Court found that the local sheriff was a policymaker for the State of Alabama even though the County paid the sheriff's salary and funded the "operations" of the sheriff's office. *Id.* at *7.

Thus, the Fourth Circuit's panel opinion in this case, with its narrow focus on the impact on the State treasury as "the most decisive factor" in the Eleventh Amendment analysis (App. A, 12a), is in conflict with this Court's well-reasoned decision in *McMillan, supra.*

The panel opinion also conflicts with *McMillan* in one other potentially important respect. The panel opinion's finding that North Carolina sheriffs are not arms of the State was based, in part, on the erroneous conclusion that "Sheriffs have been considered county

officers from the creation of that office in England." (App. A, 15a-16a). In fact, as this Court made clear in *McMillan*, the "common understanding" in this country is that "the sheriff, though limited in jurisdiction to his county and generally elected by county voters, [is] in reality an officer of the State. . . ." *Id.* at *8.

In short, the panel opinion in this case conflicts with this Court's well-reasoned decision in *McMillan*, and also conflicts with this Court's decisions of *Regents, supra* and *Hess v. Port Auth. Trans-Hudson*, 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1990). Consequently, petitioner respectfully requests that its petition for writ of certiorari be granted.

II. AN APPLICATION OF THE PROPER STANDARD WOULD CHANGE THE OUTCOME IN THIS CASE, AND RESULT IN A FINDING THAT THE OFFICE OF SHERIFF IS AN ARM OF THE STATE.

The respondents argue, among other things, that this Court should deny the petitioner's petition for writ of certiorari because, according to respondents, "Petitioner is asking the Court to engage in an academic exercise." (Respondents' brief, pp. 4, 9). Respondents appear to be arguing that even if this Court applied the standard articulated in *Regents, supra*, and "consider[ed] the provisions of State law" defining the character of the Office of Sheriff, *id.*, the Office of Sheriff would still not be considered an agency of the State. (Respondents' brief, pp. 9-10). However, respondents are wrong on this point. As shown by the discussion below, a consideration of "the provisions of state law that define the [Office of Sheriff's] character," *id.*, reveal that, under North Carolina law, the Office of Sheriff is a State agency.

In the instant case, plaintiff sued "C. D. Vernon . . . in his official capacity as Sheriff of Rockingham County." Although plaintiff did not name the Office of Sheriff of Rockingham County as a party, a suit against the Sheriff "in his official capacity" is in effect a suit against the Office of Sheriff of Rockingham County, North Carolina. This Court has emphasized that a suit against a governmental officer "in his

official capacity" is the same as a suit "against [the] entity of which [the] officer is an agent," *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3104, 87 L. Ed. 2d 114 (1985), and that victory in such an "official-capacity" suit "imposes liability on the entity that [the officer] represents," *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985). The relevant inquiry, then, for Eleventh Amendment purposes, is whether under North Carolina law, the Office of Sheriff is an agent of the State or, put another way, whether the Office of Sheriff is a State agency.[1]

The Office of Sheriff is a constitutional office of the State of North Carolina. *Borders v. Cline*, 212 N.C. 472, 476, 193 S.E. 826 (1937); *Mills v. Deaton*, 170 N.C. 386, 388, 87 S.E. 123 (1915). *See* J. Orth, *The North Carolina State Constitution, with History and Commentary*, p. 141 (1995) ("As a state office, the [Office of] county sheriff dates back to [North Carolina's] 1776 Constitution"). The Office of Sheriff is also a public office. *Borders, supra*; *Messick v. Catawba County, et al.*, 110 N.C. App. 707, 718, 431 S.E. 2d 489, 496, *rev. den.*, 334 N.C. 621, 435 S.E. 2d 336 (1993).

The Sheriff of Rockingham County is not an employee of the State of North Carolina; rather, the Sheriff occupies the Office of Sheriff, which is a public office of the State:

> To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the Position in question.
>
> An essential difference between a public office

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1. As noted in petitioner's Petition for a Writ of Certiorari, the Office of Sheriff of a particular county is not considered to be a county agency. The district court below recognized this fact, and granted summary judgment in favor of Rockingham County as to all claims asserted by the respondents. (*See* Petition, pp. 4-5).

> and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power.

State v. Hord, 264 N.C. 149, 155, 141 S.E. 2d 241, 245 (1965) (citations omitted). In the case of the Office of Sheriff, the office has been created by the State constitution, and the duties of the incumbent of the office clearly involve the exercise of a portion of the State's sovereign power: as discussed in petitioner's Petition to this Court, the Office of Sheriff in each North Carolina county possesses the State's sovereign power to preserve the peace, to enforce the State laws, to arrest and commit to jail felons and other infractors of State law, to execute all process, to provide for order in the State courts, and to execute and carry out the orders and directives of the State courts. *See, e.g., Smith v. State*, 289 N.C. 303, 307-8, 222 S.E. 2d 412, 416 (1976) ("A position is a public office when it is created by law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned"); *Meyer v. Walls*, 122 N.C. App. 507, 516, 471 S.E. 2d 422, 428-29, *rev. granted*, 344 N.C. 438, 476 S.E. 2d 119 (1996). *See State v. Knight*, 169 N.C. 333, 341, 85 S.E. 418 (1915) ("An office is 'a public position to which a portion of the sovereignty of the [State], either legislative, executive, or judicial, attaches . . . , and which is exercised for the benefit of the public' "). Thus, as noted above, the Office of Sheriff is unquestionably a public office of the State of North Carolina. *Borders, supra*; *Messick, supra.*

The fact that the Office of Sheriff is a public office is extremely significant, because it has long been established, under North Carolina law, that a public office in North Carolina is *an agency for the State.* Thus, the North Carolina Supreme Court stated as follows:

> A public office is an *agency for the State,* and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer. . . . The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts *for the State.*

Clark v. Stanley, 66 N.C. 59, 63, 8 Am. Rep. 488 (1872) (emphasis added). This long established proposition, that a "public office is an agency for the State," has been reiterated by the North Carolina Supreme Court in at least two other decisions: *State ex. rel. Wooten v. Smith*, 145 N.C. 476, 59 S.E. 649 (1907) and *State ex. rel. Barnhill v. Thompson*, 122 N.C. 495, 496, 29 S.E. 720 (1898). The cases on this point are, it must be conceded, not recent decisions. However, the decisions have never been overturned, and they remain the law of the land in North Carolina. Indeed, it is only logical that a public office, such as the Office of Sheriff, is an "agency for the State," since, as noted above, a public office by definition exercises a portion of the State's sovereign power. *Smith v. State, supra*; *State v. Knight, supra*. *See Groves v. Barden*, 169 N.C. 8, 10, 84 S.E. 1042 (1915) ("The most important characteristic [of a public office] is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the [State] Government").

North Carolina State courts have recognized that the Office of Sheriff in each county is entitled to the *State's* sovereign immunity. For example, in *Smith v. Phillips*, 117 N.C. App. 378, 451 S.E. 2d 309 (1994), the Court stated:

> Absent waiver or consent, the doctrine of sovereign immunity provides the State [and] its public officials with absolute and unqualified immunity from suits against them in their official capacities. . . . It is generally established that a sheriff is a public official entitled to sovereign immunity and, unless the immunity is waived pursuant to a statute, is protected from suit against him in his official capacity.

Id., 117 N.C. App. at 381, 451 S.E. 2d at 312. Thus, North Carolina law establishes that a North Carolina sheriff is a public official of the State, entitled to sovereign immunity from suit in his official capacity. *Id. See Messick, supra* at 714, 431 S.E. 2d at 493 (holding that the doctrine of sovereign immunity bars actions against the State and its

public officials sued in their official capacity). Furthermore, the State of North Carolina, acting through its court system, has concluded that a North Carolina sheriff, in his official capacity, is a State officer and therefore not a "person" subject to suit under 42 U.S.C. § 1983. In *Messick, supra*, the North Carolina Court of Appeals specifically held that a North Carolina sheriff, in his official capacity, is a State officer and therefore not a "person." *Id.*, 110 N.C. App. at 713-14, 431 S.E. 2d at 493. The North Carolina Court of Appeals also held that a sheriff cannot be sued in his official capacity under 42 U.S.C. § 1983 in the case of *Slade v. Vernon*, 110 N.C. App. 422, 429, 429 S.E. 2d 744, 748 (1993). In *Slade*, the court held that the Sheriff of Rockingham County, in his official capacity, was not subject to suit under 42 U.S.C. § 1983, "because the only remedy sought by plaintiffs is monetary damages." *Id.* In support of this proposition, the *Slade* court cited the case of *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E. 2d 276, *disc. rev. den.*, 332 N.C. 345, 421 S.E. 2d 348 (1992). In *Lenzer*, the court, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), recited the well-established proposition that "State officials and agents [in their official capacity] are not 'persons' covered by Section 1983 when the remedy sought is monetary damages." *Lenzer, supra*, 106 N.C. App. at 513, 418 S.E. 2d at 287, *citing Will, supra*. Consequently, the *Slade* decision clearly holds that North Carolina sheriffs in their official capacity are State officers and therefore not "persons" subject to suit under 42 U.S.C. § 1983. Thus, the North Carolina Court of Appeals, in two separate opinions, has held that the Office of Sheriff is a State office and therefore not a "person" subject to suit under 42 U.S.C. § 1983. The State of North Carolina, through its courts, is clearly in the best position to evaluate the status of the Office of Sheriff and to determine whether a suit against the Office of Sheriff is a suit against the State itself.

At pages 2-3 of their brief, respondents assert that the State of North Carolina has no control over the Office of Sheriff. This assertion is, of course, completely without merit. It is true that an incumbent in the Office of Sheriff has a measure of autonomy to perform the duties of the Office, but this is true as to an incumbent of any State office. For example, the governor of the State and a local State court judge each

has a measure of autonomy as to how they perform their duties. Indeed, such constitutional offices, by their very nature, have a large measure of autonomy. *See* N.C. Const., Art. III and Art. IV (1970). Nevertheless, even respondents would concede that these public offices are agencies for the State. *See McMillan*, *supra* at *7. More importantly, however, the State has ultimate control over the Office of Sheriff and other State constitutional offices. The State of North Carolina exercised its sovereign power in 1776 to create the Office of Sheriff, in order to preserve peace across the State, enforce State laws, provide for the statewide execution of process, provide for order in the State courts, and provide for the carrying out of orders and directions of the State courts. The State may, in the exercise of its sovereign power, amend its constitution to abolish the Office of Sheriff. The State may also act, either through its General Assembly or via a constitutional amendment, to severely curtail or change the duties of the Office of Sheriff. Thus, the State has ultimate control over the Office of Sheriff: the Office of Sheriff exists at the pleasure of the State, and has only such duties and powers as the State has delegated to it. Consequently, respondents' cavalier argument that the State cannot control a county sheriff is fatally flawed.[2]

The respondents note that an incumbent in the Office of Sheriff of a particular county is the "chief law enforcement officer" in that county. *Southern Ry. Co. v. Mecklenberg County*, 231 N.C. 148, 151, 56 S.E. 2d 438, 440 (1949). The respondents also repeatedly state that an Office of Sheriff in a particular county is "local," as if the repetition of the word "local" somehow changes the Office of Sheriff from a State office into a county office. Petitioner concedes that an Office of Sheriff of a particular county is "local" in the sense that it is "of or relating to a particular place." *Webster's Ninth New Collegiate Dictionary*, p. 700 (1986). However, the mere fact that a public office or its incumbent is located in a particular county does not in any way

2. There are numerous State statutes in which the State exerts its sovereign power to direct and control the Office of Sheriff. Because of the number of statutes involved, the petitioner will not burden the Court with a recitation of these statutes at this time. Suffice it to say that the North Carolina General Statutes are replete with examples of the State directing and controlling the Office of Sheriff.

indicate that the public office is an arm of the county. For example, a Superior Court of a particular county, and a district attorney, are also "local" in the sense that they are "of or relating to a particular place." *Id.* Yet, it is clear that these entities are arms of the State. *See McMillan, supra.* As noted above, the Office of Sheriff is not a county office; rather, the Office of Sheriff itself is a State constitutional office, and is statewide in scope. As the North Carolina General Assembly has made abundantly clear, the Offices of Sheriff of the State are involved with statewide concerns:

> The General Assembly finds and declares that the sheriff, the office of deputy sheriff and other officers and employees of the sheriff . . . are unique among all law-enforcement offices of North Carolina. The administration of criminal justice has been declared . . . to be of *statewide concern* to the people of the State. . . . The sheriff, in addition to his criminal justice responsibilities, is the only officer who is also responsible for the courts of the State, and acting as their bailiff and marshal. The sheriff administers and executes criminal and civil justice and acts as the ex officio detention officer . . . The offices of sheriff and deputy sheriff are therefore of *special concern* to the public health, safety, welfare, and morals of the people of the state. . . .

N.C.G.S. § 17E-1.

Finally, respondents wrongly state that the State of North Carolina is not potentially liable for a judgment in this case.[3] As noted above,

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3. The issue of whether the State is potentially liable for a judgment against an Office of Sheriff has not been specifically addressed by the State courts, except in the cases of *Messick, supra,* and *Slade, supra,* wherein the Court held that a suit against the Office of Sheriff was a suit against the State. At common law, of course, the issue of liability for a judgment against the Office of Sheriff was unlikely to be addressed, (Cont'd)

the district court correctly held that the Office of Sheriff of Rockingham County is not an agent of the County. Consequently, the County is not potentially liable for a judgment in this case. Furthermore, as shown by the discussion above, the Office of Sheriff is a North Carolina "public office," which means that it is simply a *position* which has been created by the State constitution. *See, e.g., State v. Hord, supra*; *Smith v. State, supra*; *State v. Knight, supra*. Unlike a county or a town, the Office of Sheriff has no physical existence. An Office of Sheriff possesses no funds of its own, and it has no power to levy taxes. Since the Office of Sheriff is an "agency for the State," *Clark v. Stanley, supra*, the State is the only entity that would be potentially liable for any judgment against the Office of Sheriff.

Thus, a proper consideration of "the provisions of state law that define" the character of the Office of Sheriff, *Regents, supra*, shows that the Office of Sheriff is an agency for the State. Thus, respondents' argument that "the outcome would remain the same" under the standard articulated by this Court in *Regents, supra*, is without merit. In fact, a proper application of the standards articulated by this Court in *Regents, supra*; *Hess, supra*; and *McMillan, supra*, will result in the finding that the Office of Sheriff in North Carolina is an arm of the State, entitled to Eleventh Amendment protection.

III. AS RESPONDENTS CONCEDE, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER TEST TO APPLY WHEN DETERMINING IF AN ENTITY SUCH AS THE OFFICE OF SHERIFF IS AN ARM OF THE STATE.

At page 10 of their brief, respondents reluctantly concede that there is a conflict among the circuits as to the proper test to apply when determining if an entity such as the Office of Sheriff is an arm of the State entitled to Eleventh Amendment immunity. Respondents concede, at a minimum, that the test employed by the Fourth Circuit

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(Cont'd)
because the Office of Sheriff is entitled to share in the State's sovereign immunity. *See Smith v. Phillips, supra.*

panel opinion in this case conflicts with the test articulated by the Seventh Circuit. Nevertheless, respondents contend that the petition for writ of certiorari should be denied because "it would be more efficient to grant certiorari in a Seventh Circuit case." (Respondents' brief, p. 11). With all due respect to respondents, it would not be more "efficient" for anyone for this Court to delay addressing the conflict among the circuits in this area of the law. It is respectfully submitted, therefore, that review is needed to resolve the split in the circuits.

CONCLUSION

For all the foregoing reasons, as well as the reasons contained in the initial petition, the petition for writ of certiorari should be granted. Alternatively, petitioner requests that this case be remanded to the Fourth Circuit for further consideration, in light of this Court's recent decisions in *Regents, supra*, and *McMillan, supra*.

Respectfully submitted,

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